(3)

No. 83-2008

In The
Supreme Court of the United States
October Term, 1983

DON RAY PHINNEY,

Petitioner,

vs.

FIRST AMERICAN NATIONAL BANK,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

ROBERT J. WALKER
Counsel of Record
2700 First American Center
Nashville, Tennessee 37238
(615) 742-6261

Attorney for Respondent
First American National Bank

Of Counsel:

BASS, BERRY & SIMS
2700 First American Center
Nashville, Tennessee 37238
(615) 244-5370

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

5178

QUESTION PRESENTED

Whether the United States Court Of Appeals for the Sixth Circuit erred in holding that the District Judge did not abuse his discretion and correctly denied Don Ray Phinney's Motion To Vacate the Order of June 1, 1979 granting First American National Bank's motion for a judgment notwithstanding the verdict.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

RULES

No. 83-2008

In The

Supreme Court of the United States

October Term, 1983

DON RAY PHINNEY,

Petitioner,

vs.

FIRST AMERICAN NATIONAL BANK,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Respondent First American National Bank (hereinafter referred to as "First American") hereby submits the following brief in opposition to the Petition For A Writ Of Certiorari filed by Petitioner Don Ray Phinney (hereinafter referred to as "Phinney").

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit filed March 12, 1984, is reproduced in the Appendix to the Petition.

The Memorandum Opinion and Order of District Judge C. G. Neese, entered January 7, 1983 and denying Phinney's Motion to Reconsider, is reproduced beginning at page App. 1 of the Appendix to this brief.

The Memorandum Opinion and Order of District Judge C. G. Neese, entered December 8, 1982 and denying Phinney's Motion to Vacate the Order of June 1, 1979, is reproduced beginning at page App. 3 of the Appendix to this brief.

The Order and Memorandum of District Judge Thomas A. Wiseman, entered June 1, 1979 and granting a judgment notwithstanding the verdict, is reproduced beginning at page App. 22 of the Appendix to this brief.

The Order of the United States Court of Appeals for the Sixth Circuit, entered March 18, 1981 and affirming the judgment notwithstanding the verdict, is reproduced beginning at page App. 43 of the Appendix to this brief.

———o———

STATEMENT OF THE CASE

This suit was originally instituted on September 3, 1971 in the United States District Court for the Central District of California. On October 13, 1971, that court dismissed the complaint for lack of jurisdiction. On Phinney's Petition to Reconsider, the court entered an order vacating its order of dismissal and transferring the action to the Middle District of Tennessee. On May 2, 1973, the United States District Court for the Middle District of Tennessee dismissed the action without prejudice for Phinney's failure to appear on the trial date and to prosecute the case.

On April 22, 1974, Phinney refiled the suit in the United States District Court for the Western District of

Tennessee.[1] On First American's motion to dismiss for improper venue, the case was transferred to the Middle Distict of Tennessee on June 28, 1974.

Shortly before the trial began on October 24, 1978, Judge Thomas Wiseman held a conference of the lawyers at which he advised them that he had represented, and had been a customer of, First National Bank in Tullahoma, Tennessee, which had been acquired by First Amtenn Corporation (First American's parent corporation at the time and subsequently named "First American Corporation") a few years prior to 1978. He also advised that, prior to going on the bench, he had done legal work for the banking industry in connection with Tennessee's 1978 Constitutional Convention concerning interest rate limitations. He said that he had been engaged by First American for a brief period of time following the convention for legal advice concerning interest rate matters and his employment had ended prior on his going to the bench. He stated that he did not think this would affect his judgment in the case in any manner and asked if either party had any objection to his sitting as judge on the case, the court should be notified within a few days. Thereafter, at the beginning of the trial, the discussions were confirmed on the record and the parties stated that they had no objection to Judge Wiseman sitting as judge and no motion for recusal was filed.

At the trial, the jury returned a verdict in favor of Phinney in the amount of $999,999.00 compensatory, and $250,000.00 punitive, damages. First American filed a motion for a judgment notwithstanding the verdict and a

---

[1]For a recitation of the facts involved in the underlying suit, the Court is referred to District Judge Thomas A. Wiseman's Memorandum beginning at App. 23 of the Appendix to this brief.

new trial. On June 1, 1979, Judge Wiseman entered an order granting the judgment notwithstanding the verdict and ordering a new trial in the event that the judgment notwithstanding the verdict was overturned on appeal. (App. 22.)

Phinney appealed the June 1, 1979 order to the United States Court of Appeals for the Sixth Circuit and did not raise the recusal issue in the appeal. By an order of March 18, 1981, the sixth circuit affirmed Judge Wiseman's order. (App. 43.)

On August 26, 1982, Phinney filed a motion to vacate the order of June 1, 1979. The motion stated that it was being made pursuant to Rule 60(b)(6) of the Federal Rules of Civil Procedure and was grounded on Judge Wiseman's failure to recuse himself, *sua sponte,* from sitting as the judge at the trial. On December 8, 1982, District Judge C. G. Neese entered a memorandum opinion and order denying Phinney's motion. (App. 3.) On Monday, December 20, 1982, Phinney filed a motion for reconsideration, which was denied by Judge Neese in a memorandum opinion and order entered on January 7, 1983. (App. 1.) On February 4, 1983, Phinney filed a notice of appeal to the United States Court of Appeals For The Sixth Circuit of the order denying the motion for reconsideration. In an opinion filed March 12, 1984, the sixth circuit affirmed. The Petition for a Writ of Certiorari in this case seeks review of that decision of the sixth circuit.

———o———

REASONS FOR DENYING PETITION

This court should deny the Petition for a Writ of Certiorari in this case because, simply, this is not a case which merits review by this court. The application of Rule 17 of the United States Supreme Court Rules and an examination of the decisions rendered below in this case demonstrate that the issue presented for review is not one which this court, in the exercise of its judicial discretion, should review and disclose no error committed by a lower court in this matter.

Applying Rule 17 to this case and the particular issue concerning which review is being sought, there is no reason for this court to grant the petition. Rule 17 provides that a writ of certiorari will only be granted when there are "special and important reasons therefor." The petition completely ignores these requirements and contains reference to no contention or fact presenting a special and important reason for a review by this court. Certainly, Phinney has not and cannot in this case assert that it involves the character of reasons set out in Rule 17. Rather, as noted by the sixth circuit in its opinion of March 12, 1984, this case involves an appeal in which there is a very restricted standard of review and that can be characterized as an attempt by Phinney to get a "second bite at the apple" by pursuing his appeal on a point that was raised neither at the trial of this matter nor on the appeal of the judgment notwithstanding the verdict. (Petitioner's Appendix p. 6.)

Moreover, regardless of the nature of the case or issue presented, there has been no error committed either by the sixth circuit in its March 12, 1984 decision or by

any of the lower courts rendering the other decisions involved in this matter. This is evident from an examination of the opinions rendered below and the particular remedy being sought by Phinney on appeal.

The sixth circuit was correct in concluding that Judge Neese did not abuse his discretion in denying Phinney's motion to set aside the judgment notwithstanding the verdict. For the purposes of this brief, First American will rely on the reasoning and authorities in the opinions of the sixth circuit (Petitioner's Appendix) and Judge Neese (App. 3) rendered below. Nevertheless, it should be noted that a substantial part of Phinney's petition appears to be based upon the assertion that Judge Wiseman, as evidenced by statements in his Memorandum entered June 1, 1979, had independent and personal knowledge of facts, particularly banking procedures, which might have affected his impartial judgment. However, even a cursory examination of Judge Wiseman's Memorandum reveals that his statements were followed by citations to the trial transcript and were based upon uncontradicted proof at the trial. (App. 28-32.)

The lower courts were correct in not granting Phinney the relief he seeks. In the petition, Phinney asserts that the appropriate remedy is to set aside the judgment notwithstanding the verdict and reinstate the jury verdict. This is not only a case of Phinney attempting to obtain a "second bite of the apple," but also attempting to "have his cake and eat it too." Phinney is not asserting that the trial was affected or that he was prejudiced in any way at trial by what he asserts was Judge Wiseman's partiality in this case. Given the jury verdict, that is understandable. Rather, he apparently contends that Judge Wiseman's as-

serted partiality did not manifest itself or affect this case until the entry of the judgment notwithstanding the verdict. Judge Neese appropriately disposed of this contention as follows:

> Evidently, our Court of Appeals-panel was no more impressed with this oblique reference to judicial impartiality or a perversion of justice than is the undersigned judge; for that panel, not only affirmed Judge Wiseman's final judgment for the defendant bank, but stated he was correct in citing and applying in his " * * * well-reasoned * * * " opinion the standard of *Morelock* and affirmed the judgment herein specifically " * * * for the reasons set forth in the careful and thorough memorandum of Judge Wiseman dated July 6, 1979." *See Don Ray Phinney*, plaintiff-appellant, v. *First American National Bank*, defendant-appellee, order of C.A.6th of March 18, 1981 in no. 79-1372. The undersigned judge is hard put to understand how the following of the applicable law by Judge Wiseman could now be said, after the fact, to have resulted from his partiality in favor of the defendant-bank after he had failed to disqualify himself herein. (App. 17-18.)

CONCLUSION

This court should deny the Petition For A Writ Of Certiorari.

Respectfully submitted,

ROBERT J. WALKER
Counsel of Record
BASS, BERRY & SIMS
2700 First American Center
Nashville, Tennessee 37238
(615) 742-6261

Attorney for Respondent
FIRST AMERICAN NATIONAL BANK

APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE NASHVILLE DIVISION

No. 74-298-NA-CV

DON RAY PHINNEY,

Plaintiff,

v.

FIRST AMERICAN NATIONAL BANK,

Defendant.

MEMORANDUM OPINION AND ORDER
(Filed January 7, 1983)

The Court considered the plaintiff's motion to relieve him of the final judgment of June 1, 1979 herein, adverse to him, Rule 60 (b) (6), Federal Rules of Civil Procedure. That motion was denied. *See* memorandum opinion and order herein of December 8, 1982.

On page 24 of the latter document, the Court stated *inter alia:*

> Because of the size of the judgment Mr. Phinney was awarded by a jury before its verdict was vacated and set aside, as the trial judge was bound to do under the applicable law (as witnessed by the appellate affirmance of that action), and the obvious discontent of the losing litigant, the undersigned judge has delved deeply into all the pertinent ramifications presented by the plaintiff's present motion.

Evidently, that "deep-delving" by the Court was unsatisfying to the plaintiff; on December 20, 1982 he requested a reconsideration of such denial and an assignment

of the matter "for oral argument" in which he contends he "could successfully support its [sic: his] position as asserted in his [m]otion * * *, with supplemental [m]emorandum, [d]eclarations, and [p]oints of [l]aw by specific reference to pertinent parts of the record * * * ." He maintained also that " * * * the record as a whole supports the relief requested."

The Court, in considering the granting or denial of the plaintiff's motion for relief, took into account carefully every memorandum, declaration, and point-of-law advanced by him in support of his position on his motion. Reduced to its essentials, his motion was simply (1) that "the trial judge herein misapplied the concedly appropriate standard in this Circuit in determining a motion for a judgment notwithstanding the verdict of the jury [footnote reference omitted]" and (2) that the trial judge could not have been such in the first place had he not failed to disqualify himself as he (allegedly) was mandatorily required to do because of certain extrajudicial circumstances implicating the trial judge which which demanded his self-recusal *sua sponte.*

The first of those contentions should have been answered with finality contrary to the plaintiff's renewed insistences when the Court of Appeals for the Sixth Circuit affirmed the trial judge's application of *Morelock v. NCR Corp.,* 586 F.2d 1096 (6th Cir. 1978), and his decision under that standard " * * * for the reasons set forth in * * * [his] * * * careful and thorough memorandum of * * * July 6, 1979." *See Don Ray Phinney,* plaintiff-appellant, v. *First American National Bank,* defendant-alellee (sic), order of C. A. 6th of March 18, 1981 in no. 79-1372. (It is noted that the plaintiff did not

seek from the Supreme Court of the United States certiorari to our Court of Appeals to review its decision.) As indicated earlier, this baseless argument " * * * borders on the frivolous. * * * "

The second is answered by an assertion of the Chief Justice of the United States in which there was no dissenting voice raised: " * * * Once the Court has ruled, counsel and others involved in the action must abide by the ruling * * *. [C]ounsel shall [n]ot engage the court in extended discussion once a ruling is made * * *." *Maness v. Meyers,* 419 U.S. 449, 459, 95 S.Ct. 584, 591 [5], 42 L.Ed.2d 574 (1975). There will be no extension of discussion herein; the motion of the plaintiff for reconsideration and assignment for oral argument hereby is

DENIED.

ENTER:

/s/ C. G. NEESE
United States Senior Judge
District Judge by designation
and assignment

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

No. 74-298-NA-CV

DON RAY PHINNEY,

Plaintiff,

v.

FIRST AMERICAN NATIONAL BANK,

Defendant.

MEMORANDUM OPINION AND ORDER

(Filed December 8, 1982)

The plaintiff Mr. Don Ray Phinney moved the Court to relieve him of the final judgment of June 1, 1979 herein for the defendant First American National Bank (bank) for a reason he claims justifies relief from its operation. Rule 60 (b) (6), Federal Rules of Civil Procedure.[1] He claims the trial judge was required mandatorily to disqualify himself under the circumstances herein, 28 U.S. C. § 455(b)(2),(4),[2] and that failure of the trial judge to disqualify himself justifies his relief from the operation of the judgment against him.

---

[1]" * * * On motion and upon such terms as are just, the court may relieve a party * * * from a final judgment * * * for * * * any other reason [than those specified in sub-§§ (1)-(5), inclusive, of the same sub-§ hereof] justifying relief from the operation of the judgment. * * *" Rule 60(b) (6), *supra*.

[2]" * * * Any * * * judge * * * of the United States shall * * * disqualify himself in the following circumstances:

* * *

"Where in private practice he served as lawyer in the matter in controversy * * * ;

* * *

"He knows that he, individually or as a fiduciary, or his spouse * * *, has a financial interest in the subject matter in controversy. * * *"

28 U.S.C. § 455 (b) (2), (4), *supra*. While there seems to be reliance also on the provisions of 28 U.S.C. § 455(a), the "impartiality [of the trial judge which] might reasonably be questioned" therein may be waived, and "waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification." 28 U.S.C. § 455(e). There was a substantial disclosure of such on the record, and, as this Court understands, the plaintiff concedes such waiver but claims he should not be bound by it under all the circumstances presented. The thrust hereof, therefore, goes to the claim that the trial judge should have disqualified himself sua sponte as to the grounds for disqualification enumerated in sub-§ (b) of § 455 as to which "[n]o judge * * * shall accept from the parties to the proceeding a waiver * * *," 28 U.S.C. § 455(e), *supra*.

"The objective of § 455 was to deal with the reality of a positive disqualification by reason of an interest or the appearance of a possible bias. The House and Senate Reports on § 455 reflect a constant assumption that upon disqualification of a particular judge, another would be assigned to the case. For example:

> " '[I]f there is any reasonable factual basis for doubting the judge's partiality, he should disqualify himself *and let another judge preside over the case.*' S. Rep.No. 93-419, at 5 (1973) (emphasis added); H.R.Rep.No. 93-1453, at 5 (1973) (emphasis added), U.S. Code Cong. & Admin. News 1974, pp. 6351, 6355.[']

The reports of the two Houses continued:

> " 'The statutes contain ample authority for chief judges *to assign other judges* to replace either a circuit or district court judge who becomes disqualified [under § 455].' S.Rep.No. 93-419, *supra,* at 7 (emphasis added); H.R.Rep.No. 93-1453 *supra,* at 7 (emphasis added), U.S. Code Cong. & Admin. News 1974, p. 6357.

" * * * The declared purpose of § 455 is to guarantee litigants a fair forum in which they can pursue their claims. * * * " *United States v. Will,* 449 U.S. 200, 101 S.Ct. 471, 481, 66 L.Ed.2d 392 (1980).

Mr. Phinney asserts that he was deprived of a fair forum in which to pursue his claim when the trial judge herein misapplied the concededly appropriate standard in this Circuit of determining a motion for a judgment notwithstanding the verdict of the jury,[3] Rule 50 (b),

---

[3]The plaintiff set-forth in aid of his motion under Rule 60(b) (6), *supra,* a reference to an accompanying memorandum

(Continued on next page)

Federal Rules of Civil Procedure, as enunciated in *Morelock v. NCR Corp.*, 586 F.2d 1096 (6th Cir. 1978). He is proscribed from this effort to make-out an appropriate case for the mandatory recusal by the trial judge on the basis of the determination by the trial judge of the defendant's motion for a judgment notwithstanding the jury's verdict; he may rely only " * * * on extra-judicial conduct rather than matters arising in the judicial context. *Davis v. Board of Commissioners of Mobile County, supra,* 517 F.2d [1044] at 1052 [5th Cir. 1975], *cert.den.* 425 U.S. 944, 96 S.Ct. 1685, 48 L.Ed.2d 188 (1976)] (construing amended § 455(a) *in pari materia* with 38 U.S.C. § 144, the other federal disqualification statute).

See United States v. Grinnel Corp., 384 U.S. 563, 583, 86 S.Ct. 1698, 1710, 16 L.Ed.2d 778 (1966); *Berger v. United States,* 255 U.S. 22, 31, 41 S.Ct. 230, 232, 65 L.Ed. 481 (1921). * * * " *Bradley v. Milliken,* 620 F.2d 1143, 1157 [7] (6th Cir. 1980). The other federal disqualification statute mentioned, *supra,* was described by the Supreme Court thusly:

> It is a provision obviously not applicable save in those rare instances in which the affiant is able

---

(Continued from previous page)

of points and authorities and, by argument in the latter document, delineated a listing of four points wherein he claims "the judge violated the *[Morelock]* rule and in effect became the all-powerful 13th juror." Two of the eight pages of that document were devoted to that argument.

(Parenthetically, in federal courts sitting in Tennessee, the federal judge is not the seventh juror, at liberty to set-aside the verdict of the jury when dissatisfied with it. *Werthan Bag Corp. v. Agnew,* 202 F.2d 119, 122 [3] (6th Cir. 1953).)

> to state facts which tend to show not merely adverse rulings already made, which may be right or wrong, but facts and reasons which tend to show personal bias or prejudice. It was never intended to enable a discontented litigant to oust a judge because of adverse ruling made, for such rulings are reviewable otherwise, but to prevent his future action in the pending cause.

Ex parte American Steel Barrel Co., 230 U.S. 35, 33 S.Ct. 1007, 1010, 57 L.Ed. 1379 (1913). Read *in pari materia*, § 455 is to be accorded the same purpose here as was accorded § 144 there.

In point-of-fact, all the affiants adduced facts, as opposed to arguments, bearing on the question of extra-judicial conduct of the trial judge herein.

I

A.

The first of these relates to the claim of the plaintiff that the trial judge should have disqualified himself because of his admission that, in the private practice of law, he served as lawyer in this matter in controversy. If so, it cannot be questioned that the trial judge must have recused himself as disqualified herein. 28 U.S.C. § 455(b) (2), *supra; United States v. Amerine*, 411 F.2d 1130, 1133 [4] ("[T]he language of the statute is mandatory. As to this feature of the statute, prejudice is presumed whether actually present or not.") " * * * The proper test, it has been held, is *whether the charge* of lack of impartiality *is grounded on facts* that would create a reasonable doubt concerning the judge's impartiality, not in the mind of the judge himself or even necessarily in

the mind of the litigant filing the motion under 28 U.S.C. § 455 [, *supra,*] but rather in the mind of a reasonable man. * * * " *United States v. Cowden,* 545 F.2d 257, 265 (5th Cir. 1976), *cert. den.* 430 U.S. 909, 97 S.Ct. 1181, 51 L.Ed.2d 585 (1977). (Emphases added by the present writer.)

The transcript of the record of pretrial statements herein reflects that the trial judge did indeed say in open court in the absence of the jury:

> " * * * [A]s a lawyer prior to my assuming the bench, I at one time represented the defendant First American National Bank in this cause * * * ."

However, the charge of Mr. Phinney, that the trial judge was partial to the defendant bank because he, as a lawyer in private practice, had represented it in this very matter in controversy, is not grounded on the true facts; those facts are:

Prior to becoming such, the trial judge, had given legal counsel to the defendant bank. The Court notices judicially: that the trial judge had served earlier in the General Assembly (legislature) of Tennessee, as its state treasurer, and sought statewide the nomination of his political party as Governor of Tennessee; and that, in the Constitutional Convention of Tennessee of 1978, an issue was the then-existing limitation on the legal rate of interest in this State.

It was shown factually herein that the trial judge had represented the interest of the banking industry of this State during the course of such Convention, in which such legal-interest limitation relative to that increase was to be considered by the General Assembly of Tennessee in

1979 and thereafter. In this connection, the trial judge was engaged by the defendant bank, effective March 15, 1978, to conduct a research-project regarding permissible future legislation under the revised Constitution and to advise the defendant as to its proper handling of its lending contracts, and its proper revised practices under such revision and the prospective legislative enactments related thereto. That employment ceased on July 15, 1978, which, as this Court notices also judicially, was some six weeks before the trial judge was inducted into office as such on August 25, 1978, and this trial commenced within 60 days of such induction.

The sworn statements in the affidavit of the executive vice president of the defendant bank are specific that, after July 15, 1978, the trial judge

> "was not thereafter employed by First American National Bank, its holding company, or any affiliated enterprise. * * * At no time during his employment was he ever consulted with, or given information about, the matter of Don Ray Phinney vs. First American National Bank. * * * [*i.e.*, this] matter has been handled since its commencement by Bass, Berry & Sims."

The exclusivity of such law-firm's representation of the defendant bank was confirmed by Robert J. Walker, Esq., a member thereof, in his affidavit herein, who stated therein *inter alia:*

> "I have represented First American National Bank of Nashville in the captioned [this titled] matter since the first Phinney lawsuit was brought in December, 1971.
>
> * * * * * * *
>
> " * * * No attorney other than me, my partners and associates have ever been involved in representing

> First American National Bank in this matter. * * * I am confident that Judge Wiseman never ever knew about *Phinney vs. First American National Bank* until it showed up on his court docket. I believe Judge Wiseman intended his comment * * * simply to identify First American as the defendant in this cause, and not to indicate that he had ever represented First American in this cause."

This was the understanding also of the trial judge's foregoing comment on the part of Gareth Aden, Esq., who was Mr. Phinney's trial counsel herein. He stated *inter alia:*

> "* * * The reference * * * to the effect that the judge had at one time represented First American 'in this cause' is in my belief incorrect, and I understood his statement at the time to mean that First American National Bank was a party in this cause, not that he had ever represented that bank in this cause. * * * "

The distinct probabilities are that this is true: that Judge Wiseman indulged faulty sentence-structure in a redundant manner in his oral pretrial statement and intended merely to convey the meaning:

> [A]s a lawyer prior to my assuming the bench, I at one time represented the defendant First American National Bank—[which is the defendant] in this [very] cause * * * .

It is inconceivable to this Court that, even as a neophyte trial judge, a person with Judge Wiseman's credentials as a public servant, a practicing lawyer of many years, and as a judge, would have presided over the trial herein had it been in his mind that, in private practice, he had served as a lawyer in this very matter in controversy. In

spite of his ostensible statement to the contrary, this Court hereby FINDS that he did not.

B.

It is conceded by all that the defendant bank is owned by a bank-holding company, the First Amtenn Corporation (now, First American Corporation), which acquired also the stock of the First National Bank of Tullahoma. In making his disclosure of his former representation of the defendant bank, Judge Wiseman revealed also:

> "[A]t another time prior to 1971, I represented what at that time was an independent bank, First National Bank of Tullahoma, for a brief period of time, which has now subsequently—I think 1973 or '74—become part of the First Amtenn system. * * * "

Both as to Judge Wiseman's former representation of the defendant bank, as well as his prior representation of another bank which has since been acquired by the bank-holding company which owns both, his " * * * prior representation of a party * * * with regard to * * * matter[s] unrelated to the litigation before him d[id] not automatically require recusal, 28 U.S.C. § 455 (1970). [Footnote reference omitted.] *Carr v. Fife,* 156 U.S. 494, 498, 15 S.Ct. 427, 39 L.Ed. 508 (1895); *Darlington v. Studebaker-Packard Corp.,* 261 F.2d 903, 906-07 (7th Cir. ([1959]), *cert. denied,* 359 U.S. 922, 79 S.Ct. 1121, 3 L.Ed.2d 980 (1959); see *Laird v. Tatum,* 409 U.S. 824, 93 S.Ct. 7, 34 L.Ed.2d 50 (1972) (Rehnquist, J.) * * * ." *National Auto Brokers v. Gen. Motors Corp.,* 572 F.2d 953, 958 [2] (2d Cir. 1978); *see* also *United States v. Holdeman,* 559 F.2d 31, 38 [204] (D.C.Cir. 1976). However, "* * * if his relation with the client [wa]s a close one, the judge's imparti-

ality might be questioned * * * ," 13 Wright, Miller & Cooper, Federal Practice and Procedure 371: Jurisdiction § 3549, and under the general impartiality standard of 28 U.S.C. § 455 (a), he might have been disqualified because he had " * * * had a long association with a party as counsel, even on matters not involved in the[se] proceedings. See § 3549 * * * ," *ibid.*, at 357, n. 4, § 3544.

The Court hereby FINDS that Judge Wiseman's association with his (former) hometown bank was, in his words, " * * * for a brief period of time * * * "; that his association with the defendant bank was for a period of only four months; and that circumstances relating to those associations were not extant which required his disqualification herein mandatorily.

II.

The second reason Judge Wiseman was required mandatorily to have disqualified himself herein, as advanced by Mr. Phinney, is that the trial judge knew pretrial that he, individually or as a fiduciary,[4] or his wife had a financial interest in the subject-matter in controversy. 28 U.S.C. § 455 (b) (4), *supra.* The precise nature of such "financial interest" therein is difficult to "track" from the plaintiff's motion and accompanying memorandum.

---

[4]This record is utterly devoid of any data whatever to support the plaintiff's assertion that the trial judge knew pretrial of some financial interest he had of a fiduciary nature in the outcome of the subject-matter herein. " '[F]iduciary' includes such relationships as executor, administrator, trustee, and guardian * * * ," for the purposes of this disqualification statute. 28 U.S.C. § 455(d) (3).

A.

It is assumed that Mr. Phinney read bias and prejudice against him and partiality in favor of the defendant bank, or its holding company, from the following disclosure of Judge Wiseman:

> "I do my personal banking business with First National Bank of Tullahoma, and have for thirty years, and it is now a part of the First Amtenn system. * * *"

"* * * [T]he fact that the judge is a depositer in a bank which is [even indirectly] a party to an action before him, standing alone, * * * [is not] * * * sufficient to [have] require[d] disqualification. * * *" *North Carolina National Bank v. Gillespie,* 28 N.C.App. 237, 220 S.E.2d 862, —, [4] (1976).[5]

Here, Judge Wiseman's association with his hometown bank was and is of long duration, perhaps, even "close"; but that circumstance would not seem to have required his disqualification herein. "* * * The relationship of bank and depositer is that of debtor and creditor, founded upon contract. The bank has the right and duty under that contract to honor checks of its depositor properly drawn and presented, absent a revocation that gives the bank notice prior to the time the checks are accepted or paid by the bank. * * *" *Bank of Marin v. England,* 385 U.S. 99, 87 S.Ct. 274, 276 [4], [5], 17 L.Ed.2d 197 (1966); *see* also *Anderson Nat. Bank v. Luckett,* 321 U.S.

---

[5]Were that rule otherwise, the undersigned judge would be disqualified herein as a depositer of most recent vintage of the First American Bank, N. A., understood to be the successor to the defendant-bank and part and parcel of the First American Corporation, *supra.*

233, 64 S.Ct. 599, 607 [16], 88 L.Ed.2d 692 (1944) (A bank is obligated to pay "* * * the chose in action of the depositer against the bank in accordance with the terms of the deposit.") Rather than rendering the depositor beholden to the caprice of the bank, the bank is the agent of the depositer and owes its depositer "* * * the duty of loyalty which every agent owes its principal. * * *" *Third Nat. Bank in Nashville v. Carver,* 31 Tenn.App. 520, 218 S.W.2d 66, 70 [8] (C.A.Tenn. 1948), *cert.den.* by the Supreme Court of Tennessee (1949).

This Court hereby FINDS nothing in the circumstance of Judge Wiseman's contractual relationship as a depositor of a bank, the stock of which is held by the same bank-holding company which holds the stock of the defendant-bank, which required mandatorily his disqualification herein.[6]

B.

Mr. Phinney exhibited with his affidavit herein reproduced copies of certificates therefor, reflecting that Judge Wiseman had owned at one time 200 shares of the stock of First Amtenn Corporation, *supra.* It hereby is FOUND that Judge Wiseman did not disclose his former financial interest therein, but that such ownership had ceased pretrial, *viz.,* on August 22, 1978.

The "financial interest" which requires a judge mandatorily to disqualify himself *sua sponte* or otherwise

---

[6]It would seem that Judge Wiseman's announcement had done his "personal banking business" with such institution over a 30-years period might have prompted further inquiry of counsel as to the place he and his wife had borrowed money to buy their home.

refers to a *present* ownership at the pertinent time "* * * of a legal or equitable interest, however small * * *," with certain exceptions irrelevant to this consideration. 28 U.S.C. § 455 (d), (4), *supra; cf. Tumey v. Ohio,* 273 U.S. 510, 47 S.Ct. 437, 441 [2], 71 L.Ed. 749 (1927) (where it was held a violation of the Constitution, Fourteenth Amendment, Due Process Clause, for a judge to subject the liberty or property of a criminal defendant to the judgment of a Court, "* * * the judge of which *has* [emphasis added by this writer] a direct, personal, substantial pecuniary interest in reaching a conclusion against him in his case.")

The Court FINDS Judge Wiseman had no financial interest implicating directly or indirectly the defendant-bank during the progress of this litigation.

C.

Mr. Phinney exhibited with his affidavit herein a reproduced copy of the deed of trust of Judge Wiseman and his wife on their improved real estate in Davidson County, Tennessee, pledging it as collateral security for their repayment of a certain loan of money to them by the First National Bank of Tullahoma of April 6, 1977. It hereby is FOUND that the trial judge did not disclose pretrial that such loan was outstanding when this trial commenced.

This Court hereby FINDS further that the circumstance of this borrowed money and the pledging of such security would not seem in retrospect to have required mandatorily his disqualification herein. All that loan imports is his and his wife's bororwing money with their promise to return it with interest along with their pledg-

ing of collateral security with their promise to redeem it. *Nichols v. Fearson,* 7 Pet. (US) 103, 8 L.Ed. 623 (1838).

"* * * Formal bank loans are usually made on the basis of applications therefor and financial statements by the applicants. * * *" 10 Am.Jur.2d 656, Banks, § 683. "* * * 'All * * * deeds of trust, howsoever drawn, are deemed in equity as mere securities, notwithstanding any stipulations that the title is to become absolute on certain conditions; and such conveyances constitute mere liens, and must be enforced as such.' No fault can be found with this text [Gibson's Suits in Chancery] because those principles are well settled. Ehert v. Chapman, 67 Tenn. 27. * * *" *Walker v. Wood,* 31 Tenn.App. 196, 213 S.W.2d 523, 526 [3] (C.A.Tenn.1948), *cert.den.* by the Supreme Court of Tennessee (1948). This Court discerns no superior or inferior position of the lender or the borrowers in these circumstances; the parties' contract is a matter of memorandum between them, and the lender, as a national bank when the loan was negotiated, was subject to all the prohibitions, powers and duties of a member-bank of the Federal Reserve System, *see* 12 U.S.C. ch. 3, in making the loan to Judge and Mrs. Wiseman relating to their improved real estate. *First Nat. Bank v. Anderson,* 269 U.S. 341, 46 S.Ct. 135, 140 [12], 70 L.Ed. 295 (1926).

The Court hereby FINDS that neither Judge Wiseman nor Mrs. Wiseman had any financial interest whatsoever in the subject-matter here in controversy.

As the Supreme Court observed in *Ex parte American Steel Barrel Co., supra,* 28 U.S.C. § 455, *supra,* was never intended to require the disqualification of a trial judge to enable a discontented litigant to rid himself or herself

of a judge whose adverse rulings are reviewable. Herein, the jury returned a verdict for Mr. Phinney and against the defendant bank and awarded him compensatory damages of $999,999 as well as punitive damages of $250,000—an aggregate of only $1 less than a million-and-a-quarter dollars. Judge Wiseman was required, as any other judge in this Circuit would also have been required, to determine the timely motion of the defendant bank, for entry of a final judgment for it notwithstanding the verdict of the jury, Rule 50 (b), Federal Rules of Civil Procedure, under this standard enunciated in *Morelock v. NCR Corp., supra,* 586 F.2d at 1086 (6th Cir. 1978).

Mr. Phinney disagreed with Judge Wiseman's application of that standard and now states: "* * * Plaintiff's counsel noted in his opening brief the effect which the trial judge's lack of impartiality had in rendering a decision on the judgment notwithstanding the verdict when he noted that in ruling on the [d]efendant's motion the Court weighed the evidence, viewed it in a light most *un*favorable to the [plaintiff, and drew all inferenced [sic: inferences] against the [p]laintiff. This act of trial Court [sic] clearly violated the controlling law to be followed by a judge in ruling on a motion for judgment notwithstanding the verdict:", setting forth then the standard contained in *Morelock, supra.*

Evidently, our Court of Appeals-panel was no more impressed with this oblique reference to judicial impartiality or a perversion of justice than is the undersigned judge; for that panel, not only affirmed Judge Wiseman's final judgment for the defendant bank, but stated he was correct in citing and applying in his "* * * well-reasoned * * *" opinion the standard of *Morelock* and affirmed

the judgment herein specifically " * * * for the reasons set forth in the careful and thorough memorandum of Judge Wiseman dated July 6, 1979." *See Don Ray Phinney,* plaintiff-appellant, v. *First American National Bank,* defendant-appellee, order of C.A.6th of March 18, 1981 in no. 79-1372. The undersigned judge is hard put to understand how the following of the applicable law by Judge Wiseman could now be said, after the fact, to have resulted from his partiality in favor of the defendant-bank after he had failed to disqualify himself herein.

" * * * The basis for a disqualification for lack of impartiality must be reasonable. * * * " *S. J. Groves & Sons v. Intern. Bro. of Teamsters,* 581 F.2d 1214, 1246 [7]. The Judiciary Committee of the United House of Representatives, in considering the enactment of 28 U.S.C. § 455, *supra,* said as much:

> * * * Disqualification for lack of impartiality must have a reasonable basis. Nothing in this proposed legislation should be read to warrant the transformation of a litigant's fear that a judge may decide a question against him into a "reasonable fear" that the judge will not be impartial. Litigants ought not to face a judge where there is a reasonable question of partiality, but they are not entitled to judges of their own choice.

H.R.Rep.No. 93-1453, *supra,* at 5, *reprinted, supra,* at 6315, 6355.

The plaintiff knew, or should have known, when he interposed his motion under Rule 60 (b) (6), *supra,* and requested Judge Wiseman to disqualify himself at this late date, that his motion would be decided by another judge when Judge Wiseman did so. *Cf. United States v.*

Will, supra, 101 S.Ct. at 479 [3] ("In federal courts generally when an individual judge is disqualified from a particular case by reason of § 455, the disqualified judge simply steps aside and allows the normal administrative processes of the court to assign the case to another judge not disqualified.") By that process, his motion is now assigned for determination by the undersigned judge. "* * * It is only in exceptional or extraordinary circumstances that district courts will grant the relief contemplated by Rule 60 (b) (6), *supra.* Ackermann v. United States (1950), 340 U.S. 193, 202, 71 S.Ct. 209, 95 L.Ed. 207, 212 (headnote 3); Klapport v. United States (1949), 335 U.S. 601, 613, 69 S.Ct. 384, 93 L.Ed. 266, 276 (headnote 5); John E. Smith's Sons Co. v. Latimer Foundry and Mach. Co., C.A.3d (1956), 238 F.(2d) 815, 817 [5]. * * *" *Silvers v. TTC Industries, Inc.,* 395 F.Supp. 1318, 1321 [1] (*per* Neese, J., E.D.Tenn.), affirmed 513 F.2d 632 (6th Cir. 1974). The plaintiff could have chosen to seek relief in an unexceptional and ordinary manner by assigning as error on his appeal herein his claim that Judge Wiseman was required mandatorily to recuse himself *sua sponte. Davis v. Board of School Com'rs of Mobile County, supra,* 517 F.2d at 1051 [9], citing (in this context) *United States v. Seiffert,* 501 F.2d 974 (5th Cir. 1974), and *Shadid v. Oklahoma City,* 494 F.2d 1267, 1268 [3] (10th Cir. 1974); he cannot be relieved of that choice now "* * * because hindsight seems to indicate to him that his decision not to [assign the trial judge's failure to disqualify himself *sua sponte* on his] appeal was probably wrong * * *. There must be an end to litigation someday, and free, calculated, deliberate[7] choices are not to be relieved from. * * *"

---

[7]Mr. Phinney, as Mr. Ackermann had, offered their "reasons" why their respective choices were not "free" and "deliberate".

Ackermann v. United States, supra, 71 S.Ct. at 211-212 [3]; *Cf. Polites v. United States,* 24 F.R.D. 401 (D.C.Mich. 1968), affirmed, 272 F.2d 709 (6th Cir. 1969), *cert.grant.* 361 U.S. 958, 80 S.Ct. 202, 4 L.Ed.2d 541 (1960), affirmed, 364 U.S. 426, 81 S.Ct. 202, 5 L.Ed.2d 173 (1960)

Whether Judge Wiseman should have disqualified himself, acting *sua sponte* or after an objection, addressed itself to his judicial discretion. *Woodruff v. Tomlin,* 593 F.2d 33, 44 (6th Cir. 1979), after hearing *en banc,* 616 F. 2d 924 (1980), cited in *City of Cleveland v. Krupansky,* 619 F.2d 576, 579 (6th Cir. 1980). The standard of review here is whether his failure to act *sua sponte* was an abuse of that discretion. *S. J. Groves & Sons v. Intern. Bro. of Teamsters, supra,* 581 F.2d at 1246.

Because of the size of the judgment Mr. Phinney was awarded by a jury before its verdict was vacated and set-aside, as the trial judge was bound to do under the applicable law (as witnessed by the appellate affirmance of that action), and the obvious discontent of the losing litigant, the undersigned judge has delved deeply into all the pertinent ramifications presented by the plaintiff's present motion. Having done so, it is the opinion of this Court that there were no circumstances reasonably requiring Judge Wiseman to have recused himself herein *sua sponte;* he had made it clear at the outset that he would disqualify himself if confronted with any objection from either party herein, and none was made until *post*-trial and appeal.

Therefore, it hereby is CONCLUDED that Mr. Phinney's *post*-judgment challenge of the purported impartiality of Judge Wiseman lacks substantial merit and, in

some respects, borders on the frivolous. Federal district judges were forewarned by the U. S. House Judiciary Committee to require a reasonable showing before indulging disqualification under 28 U.S.C. § 455, *supra,* when it was under consideration, stating *inter alia:*

> in assessing the reasonableness of a challenge to his impartiality, each judge must be alert to avoid the possibility that those who would question his impartiality are in fact seeking to avoid the consequences of his expected adverse decision. * * *

H.R.Rep.No. 93-1453, *supra,* at 5, *reprinted, supra,* at 6315, 6355. Mr. Phinney did not make the requisite showing. It hereby is FOUND: that Judge Wiseman did not abuse the discretion reposited in him as a jurist; that the plaintiff Mr. Phinney pursued his claim against the bank in a fair forum; and that there are no reasons shown by him justifying his being relieved from the final judgment herein of this Court.

Therefore, the motion of the plaintiff of August 26, 1982, to be relieved of the final judgment herein of June 1, 1979 hereby is

DENIED.

ENTER:

/s/ C. G. Neese
United States Senior Judge
District Judge by designation
and assignment

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE,
NASHVILLE DIVISION

NO. 74-298-NA-CV

DON RAY PHINNEY,

Plaintiff

vs.

FIRST AMERICAN NATIONAL BANK
OF NASHVILLE,

Defendant

ORDER

(Filed June 1, 1979)

In accordance with the memorandum contemporaneously filed herewith, it is ORDERED that the defendant's motion for judgment notwithstanding the verdict is granted, and in the event that the judgment of the Court on the motion notwithstanding the verdict is reversed on appeal, the Court conditionally grants defendant's motion for a new trial upon the ground that the verdict of the jury is contrary to the weight of the evidence.

/s/ Thomas A. Andrews
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE,
NASHVILLE DIVISION

NO. 74-298-NA-CV

DON RAY PHINNEY,

Plaintiff

vs.

FIRST AMERICAN NATIONAL BANK
OF NASHVILLE,

Defendant

M E M O R A N D U M

(Filed June 1, 1979)

The uncontroverted facts in this case are as follows:

1. Between September 28, 1966, and October 3, 1966, the plaintiff, Don Ray Phinney, issued seven checks on out-of-state banks which were cashed by the defendant. All seven checks were eventually returned unpaid to the defendant bank. The total of the outstanding bad checks was $1,450.

2. On October 11, 1966, the plaintiff entered defendant's branch stating that he wished to take up the bad checks. Only two of the checks totaling $400 had been returned at that time. The plaintiff took up the two checks totaling $400 and opened an account in the defendant bank in the amount of $100. The remaining checks, totaling $1,050 were subsequently returned, four being marked "account closed" and one returned for insufficient funds.

3. On October 14, 1966, the plaintiff withdrew $95 from the $100 account he had opened three days previously with the defendant bank. The plaintiff never made another deposit to the account.

4. Between October 11, 1966, and November 8, 1966, the plaintiff wrote seven checks on the account in defendant bank (in which he at that time had a $5 balance). Each of the seven checks written after October 11, 1966, were in excess of the $5 balance that he had and one of which was for $1,750. All seven checks were returned for insufficient funds.

5. Plaintiff's account with defendant bank was closed on November 8, 1966, for overdrafts resulting from service charges on returned checks.

6. On October 31, 1966, plaintiff gave defendant bank a check in the amount of $1,050 drawn on a third out-of-state bank to pay for the five worthless checks being held by defendant. This check was also dishonored by the drawee bank.

7. On June 6, 1967, the defendant through its agent, John C. Russell, swore out an arrest warrant before a municipal judge against plaintiff for a worthless check. Thereafter, an extradition warrant was issued to California.

8. On June 21, 1967, plaintiff was indicted by the Grand Jury of Davidson County, Tennessee, for three alleged violations of the Tennessee Bad Check Law.

9. On July 31, 1967, plaintiff was extradited from California to Davidson County, Tennessee.

10. On January 18, 1968, a criminal trial was held on Case No. 21715 (concerning a $250 check dated 10/3/

66), resulting in a guilty verdict with a recommendation of a suspended sentence. A note executed by plaintiff to defendant bank in the amount of $1,050 dated November 15, 1966, was introduced into evidence at the criminal trial.

11. A motion for a new trial in this criminal case was denied March 1, 1968, and plaintiff appealed the conviction. On October 16, 1969, the Tennessee Court of Criminal Appeals reversed the conviction upon the ground that the plaintiff had been indicted and convicted on a repealed statute. On September 8, 1970, the Tennessee Supreme Court affirmed the ruling of the Court of Criminal Appeals. The plaintiff was not reindicted nor retried on this charge.

12. On September 3, 1971, the plaintiff instituted action against the defendant in the United States District Court for the Central District of California alleging various claims in tort for personal injuries. On October 13, 1971, the California Federal District Court dismissed the complaint for lack of jurisdiction. On plaintiff's petition to reconsider, the Court entered an order vacating its order of dismissal and transferred the action to the Middle District of Tennessee pursuant to 28 U.S.C. 1406. Thereafter, on May 2, 1973, the United States District Court for the Middle District of Tennessee dismissed this action without prejudice for failure of the plaintiff to prosecute the cause.

13. On April 22, 1974, the plaintiff revived his cause of action by reinstituting the same in the United States District Court for the Western District of Tennessee in Memphis. The defendant filed a motion to dismiss for

improper venue and on June 28, 1974, the cause was transferred to the Middle District of Tennessee.

After narrowing the issues to charges of malicious prosecution and outrageous conduct, this cause came on for trial on October 24, 25, and 26, 1978. The jury returned a verdict in favor of the plaintiff on both the charge of malicious prosecution and outrageous conduct and assessed his damages at $999,999 compensatory and $250,000 punitive.

The matter is now before the Court upon motion of the defendant for judgment notwithstanding the verdict and/or in the alternative for a new trial pursuant to Rules 50 and 59 of the Federal Rules of Civil Procedure.

THE THEORIES OF THE PARTIES

The plaintiff's theory of the case is that on or about November 15, 1966, the defendant accepted a note executed by plaintiff in the amount of $1,050 in lieu of the five bad checks. The defendant's subsequent issuance of an arrest warrant and prosecution of plaintiff after the acceptance of such note constituted malicious prosecution and outrageous conduct under Tennessee law. The issue of the acceptance of the note was raised in the criminal jury trial and conviction of the plaintiff on the check charge. The plaintiff admits that the effect of the conviction of the plaintiff by the Criminal Court jury establishes probable cause (a complete defense to the present malicious prosecution action) unless the conviction was obtained by fraud. Restatement (Second) of Torts § 667 (1977). To overcome this effect, the plaintiff alleges that the agents of the defendant committed perjury at the criminal trial in their testimony regard-

ing the non-acceptance of the note in satisfaction of the bad checks, and further alleges that the note exhibited at trial was a forgery. Defendant's theory is that it did not accept the note, but was willing to do so if the plaintiff could obtain a co-signator acceptable to the defendant. Defendant insists that it prepared a promissory note for the $1,050 for the plaintiff to sign and to obtain such co-maker but that the plaintiff, without obtaining a co-maker, left the note in the bank at a branch manager's desk.

MOTION FOR JUDGMENT N.O.V.

The Sixth Circuit, in a recent opinion, has laid down the test for determining a motion n.o.v.

> A judgment n.o.v. may not be granted unless reasonable minds could not differ as to the conclusions to be drawn from the evidence. *Gillham v. Admiral Corp.* (6th Cir. 1975), 523 F.2d 102, 109, *cert. den.*, 424 U.S. 913, 96 S.Ct. 1113, 47 L.Ed.2d 318 (1976). In determining wether the evidence is sufficient, the trial court may neither weigh the evidence, pass on the credibility of witnesses nor substitute its judgment for that of the jury. Rather, the evidence must be viewed in the light most favorable to the party against whom the motion is made, drawing from the evidence all reasonable inferences in his favor. If after thus viewing the evidence, the trial court is of the opinion that it points so strongly in favor of the movant that reasonable minds could not come to a different conclusion, then the motion should be granted. *Morelock v. NCR Corp.*, 586 F.2d 1096 (6th Cir. 1978).

The application of this test to the instant case requires a review of the evidence. This discussion of the sufficiency of the evidence applies with equal force to

both the alleged tort of malicious prosecution and that of outrageous conduct. In the former, plaintiff alleges the perjury and/or forgery to overcome the effect of the judgment of conviction as establishing probable cause. In the latter, the perjury and forgery are the alleged acts of outrageous conduct along with the corollary theory that such constituted an attempt to collect a civil debt by criminal process.

THE ACCEPTANCE OF THE NOTE AND THE ALLEGED PERJURY

The plaintiff was convicted of the charge of issuing a worthless check in the Davidson County Criminal Court, by a jury, applying the test of "beyond a reasonable doubt." Plaintiff insists that the conviction was obtained by fraud on the perjured testimony of Edgar Jones and Harry Weisiger, both employees of defendant bank, that the bank had not accepted the note (TR. 286-87). The issue is whether defendant accepted a note for $1,050 in lieu of the five bad checks it was then holding, admittedly written by plaintiff (TR. 253). This issue was raised at the criminal trial and the legal effect of its resolution therein will be treated *infra.* For the purposes of the present discussion, the Court will review the conflicting evidence in the instant trial on the acceptance or nonacceptance of the note by defendant bank.

Plaintiff testified that he was permitted to sign the note (Ex. 17) for $1,050 without a co-signor in lieu of the five bad checks (TR. 310), and that he signed it in the branch before an officer of defendant (TR. 310). He attempts to corroborate this testimony and this acceptance by a phone call made by his mother and overheard on

an extension by his father with a Mr. Hussung from the bank, such conversation occurring after extradition proceedings were begun. Mrs. Phinney testified (TR. 98-99) that she asked if plaintiff had a note in the bank, was told he did, that Hussung left the phone, got the note, described it to her over the phone in amount and that it bore the initials of "E.J." (Edgar Jones) as indicating approval (TR. 98).

Further corroborative inferences are asserted by plaintiff from the encounter at the jail between the Phinneys, and bank employees, Mr. Russell, and Mr. Jones. It was testified by Mrs. Phinney (TR. 104) and corroborated to some extent by Mr. Phinney (TR. 164) that when called to the jail to talk about the note, Mr. Russell expressed surprise at the knowledge of a note. Mr. Phinney said, contrary to Mrs. Phinney, that: "They still said there wasn't any note when we asked them." (TR. 164).

Against this proof, Mr. Edgar Jones testified not only that the note was never accepted (TR. 462), but that the note was prepared at the suggestion of plaintiff that he could obtain an acceptable co-signor on the note and bring it back in (TR. 462-63). Mr. Weisiger recalled that Mr. Phinney brought the note back to the bank in Mr. Jones' absence and left it on Jones' desk (TR. 516) and that Jones reacted angrily when he found that there was no co-signor on the note (TR. 523).

Such a conflict in testimony would normally be one of credibility for the jury to resolve. Having observed the witnesses as the testimony was given, this Court would have resolved the conflict against the plaintiff. This Court felt Mr. Phinney, the plaintiff, was less than candid on

the details of his financial maneuvering. However, this is not all of the available evidence by which the two conflicting theories were tested. Other uncontradicted testimony exists which "points strongly" in favor of the position of defendant bank.

Item: The note, if accepted, would have been initialed by a lending officer (TR. 466). Exhibit 17 contains no such initials, and, unless the forgery theory is accepted (treated *infra*) this absence strongly corroborates Mr. Jones.

Item: The note, if accepted, would have contained a teller stamp with a sequentially consecutive number assigned to it (TR. 467). Once again, unless the forgery theory is accepted, the absence of such a number on Exhibit 17 is strongly corroborative of Mr. Jones.

Item: The note in its consecutive numerical sequence would be entered on the "committee book ledger" (TR. 467). The Phinney note does not appear on the "committee book ledger" (Exhibit K), an exhibit that would apparently be most difficult to fabricate.

Item: The note would contain the stamp of the audit review committee (TR. 467). Again, unless explained by the alleged forgery, the absence of such stamp on the note (Exhibit 17) speaks loudly.

Item: Plaintiff Phinney was never called upon to pay interest on the note (TR. 310).

Item: In a letter of February 6, 1978, to plaintiff's attorney, Samford DeMain, Mr. Jones called upon plaintiff to take care of "checks . . . totaling $1050 . . ." No reference was made to a note for $1,050 (TR. 472-73). Mr.

DeMain, in a response of February 9, 1967, on Phinney's behalf, made no mention of a *note* (TR. 474).

Item: Prior to the alleged execution of the note on November 15, 1966, plaintiff had not only seven checks on out-of-state banks dishonored and returned to defendant bank, plaintiff had given another check on October 31, 1966, to defendant for $1,050 to cover the five bad checks it was holding and this covering check was not good. While plaintiff knew that he had no more than $5 on deposit with defendant bank, he wrote at least seven checks for amounts in excess of his $5 balance, *one of them for $1,750;* all were returned by the defendant bank to the payees, and all of this transpired before the alleged acceptance of the note on November 15, 1966 (TR. 451 and TR. 478-79). It is inconceivable to this Court that any bank would accept a simple debt instrument note, unsecured and without a co-signor, for $1,050 in lieu of bad checks for which there was a criminal penalty, from a person who had this uncontradicted credit history. It is equally inconceivable to this Court that any juror, not influenced by passion, prejudice, or unaccountable caprice, would believe such a story.

Item: Witness Stone (to whom plaintiff had also given bad checks on Texas banks) had co-signed a note for plaintiff just previous to this alleged incident (TR. 590). Edgar Jones testified that plaintiff has suggested he though he had someone who would co-sign the $1,050 note and that Mr. Stone "was a prospect" (TR. 499). Mr. Stone testified plaintiff brought a note out to him and asked him to co-sign it (TR. 591). He could not be sure the note was the one here in question and could not remember to what bank it was made (TR. 592). This testi-

mony is corroborative of Mr. Jones' theory and is logically persuasive.

Item: If the note were accepted in lieu of the checks, the checks should have been given up by the bank to plaintiff in exchange for the note. This was not done. Plaintiff attempts to explain this on the basis of his lack of sophistication. Yet when he paid $400 for two previously returned checks, he "picked up those" (TR. 256). This plaintiff was no stranger to bad checks. At the time of his extradition, Attorney General Shriver had in his possession some seventeen worthless checks (TR. 637), and plaintiff had previously given at least one other person, Witness Stone (TR. 588), bad checks.

In view of all of the above, applying the test of *Morelock, supra,* the Court is convinced that the evidence "points so strongly in favor of the movant that reasonable minds could not come to a different conclusion."

THE FORGERY ISSUE

The issue of the alleged forgery comes into play only if the plaintiff's theory of initial acceptance of the note is valid. Plaintiff would construct his theory thusly:

1. The note was accepted in lieu of the checks by Mr. Jones;

2. The note after acceptance bore not only Mr. Jones' initials but the other stamps and markings;

3. In order to cover up for its mistake or to cover up for the malicious prosecution on checks for which a note had been accepted, the bank forged a substitute note without all of the acceptable markings so as to defend against this malicious prosecution charge.

In support of this theory, plaintiff produced an expert documents examiner who testified that the signature of Phinney on Exhibit 17 (the note of November 15, 1966) was "a slow and drawn simulation" (TR. 376).

In opposition to this testimony, defendant bank produced an expert of equally, if not more impressive credentials (TR. 604), who testified exactly to the contrary that the signature on Exhibit 17 was genuine (TR. 611).

Having resolved the issue of acceptance of the note as the Court has above, it is unnecessary to reach the issue of the forgery. However, the Court will treat it independently under the same *Morelock* test by reviewing the evidence thereon.

With the directly contradictory evidence of the experts, once again, this should be a matter for resolution of credibility by the jury. Yet there were other uncontroverted facts which bear upon this implicit finding of the jury, as with that of acceptance of the note.

Item: Mr. Phinney would not deny that the signature on Exhibit 17 was his. In this respect, the following extract from Mr. Phinney's cross-examination is pertinent:

Q. I see. And after the criminal trial you got possession of this from your attorney about January, 1968?

A. That is about right; yes, sir.

Q. And for the last ten years you have had this note in your possession?

A. That is true; yes, sir.

Q. And you have never questioned until recently that this is your signature on this note?

A. That is true, yes.

Q. *And this is in fact the same note you signed at the branch bank in November, 1966?*

A. *That is true.*

Q. And when you testified at the criminal trial you made no statement that you felt this was not the note, did you?

A. That is true, because I never saw it.

Q. And I took your deposition in May, 1972, did I not?

A. I believe so; yes, sir.

Q. Six years ago?

A. I think so.

Q. And you made no statement at that time that this was not the note or you doubted that was your signature on the note?

A. That is true.

Q. Well, today as you sit in this court, under oath, is that or is that not your signature on the note?

A. Well, according to my attorneys handwriting—

The Court: That is not what he asked you. He asked you if that is your signature. You can answer it and make whatever explanation you want to.

A. (Continued) It looks to me that that is, but I don't know. I was told—

Q. Would you like to look at it any more? You have looked at it quite a bit in the last ten years?

A. No, I have not really began to look at it except in the last—

Q. Week?

A. Yes, sir; true.

Q. *In your opinion that is your signature on that note. Is that a fair statement?*

A. *It looks to me like that is.*

Q. *Well, do you have any reason other than this expert you talked to, any reason to suspect that is not your signature on there?*

A. No. (TR. 304-06) (emphasis added).

Item: Over the course of this extended series of court appearances, Mr. Phinney has had fourteen different lawyers: Mr. Sanford DeMain, Mr. Bradley Marcus, Mr. Fred Elledge, Mr. J. Victor Barr, Mr. John Tune, Mr. Melvin Belli, Mr. F. Lee Bailey, Mr. Michael Bota, Mr. Manuel Scarmoutsos, Mr. Robert Rentzer, Mr. Stewart Mandel, Mr. Jerry F. Taylor, and Mr. Jamiel Dave and Mr. Gareth Aden in the instant proceeding. In spite of the fact that Mr. Phinney has had the note in his possession since his criminal trial in 1968, the question of a forged signature on the note was not raised until September, 1978, one month before trial. At least one inference from this fact is that the alleged forgery was a fabrication of recent origin by Mr. Phinney to meet the defense of initialing, stamping, etc., developed through discovery depositions. The matter of forgery was never plead in this or either of the other two courts in which this matter has been pending.

Although, as stated above, the question of a forgery is unnecessary to reach in view of the Court's holding that the note was never accepted by the defendant bank, on this issue, the Court finds that the evidence points so strongly in favor of the movant that reasonable minds could not differ thereon and judgment n.o.v. is proper.

THE ISSUE OF PROBABLE CAUSE

Even if plaintiff's theory of acceptance of the note were credited by the jury, and even if the theory of the forgery cover-up were credited, there is still the existence of probable cause that the plaintiff was guilty of the crime charged. Want of probable cause is an essential element of the tort of malicious prosecution. Restatement Torts 2d, Section 653. The checks in question were written on out-of-state banks, and four of them were returned "account closed" (Exhibit 5). These facts alone constitute circumstances creating a presumption that plaintiff passed those checks with the intent to defraud in violation of the bad check law. T.C.A. 39-1904 (old bad check law); *Kirby v. State,* 214 Tenn. 296, 379 S.W.2d 780 (1964). The presumption created by the statute alone is sufficient to convict an accused of the crime, *Stines v. State,* 556 S.W. 2d 234 (Tenn. Crim. Ct. App.), *cert. denied, id.* (Tenn. 1977). Acceptance of the note, or even payment of the checks in cash, cannot prevent the operation of this presumption since the checks were drawn on out-of-state banks and were returned "account closed." T.C.A. 39-1904; *Kirby v. State, supra.*

Absent the case where a check is written on an in-state bank and returned for insufficient funds and the accused has a period within which to make the checks good and escape criminal liability, the crime of obtaining money by means of a bad check is completed at the time the check is passed and constitutes a wrong affecting the public. The fact that the accused gives the defrauded party payment or a note for the civil debt owing by reason of the transaction does not affect the question of probable cause or guilt. *Beach v. State,* 230 Pac. 758 (1924); *Chick v.*

Wingo, 387 F.2d 330 (6th Cir. 1967); *U.S. v. Gross,* 416 F.2d 1205 (8th Cir. 1969), *cert. denied,* 397 U.S. 1013, 90 S.Ct. 1245, 25 L.Ed.2d 427; *Beauregard v. Wingard,* 237 Cal. App. 2d 760, 47 Cal. Reptr. 279, 15 A.L.R. 3d 955; 22 CJS "Criminal Law" § 41 (1961).

The testimony of Davidson County Attorney General Shriver is particularly compelling on the question of probable cause:

Q. General Shriver, tell the Court and the jury, if you will, what warrants you had outstanding on Mr. Phinney at the time you commenced prosecution or got the indictment in June, 1967.

A. Well, all together there were two unserved warrants, four active warrants, four indictments involving seventeen worthless checks written on four different banks, for a total amount of $1305.88.

Q. Why did you select the First American checks to present to the grand jury and use at the trial?

A. Well, those were the most easily prosecuted cases, because we had several witnesses who could identify Mr. Phinney as the man who had written the checks.

Many times, in worthless check cases, you have no one who remembers or they can identify the person who wrote the check. In this case we had very good identification from bank employees.

There were some other checks that we had good identification also, but these were larger checks and seemed to be more just—we seemed more justified in prosecuting the larger cases.

Q. Who were some of the other people that you had bad checks from?

A. There were two groups of checks, two different Holiday Inn's. One group of six checks to the Holiday Inn on James Robertson Parkway. Three

others to another Holiday Inn on Murfreesboro Road. There was one—those two—that group of nine checks was written on Lake Jackson State Bank of Lake Jackson, Texas. Then there was a check given to Castner-Knotts, written on the Commerce Union Bank here in Nashville. Then there was the four checks for—that were cashed at First American Bank. Three of those were on the First Freeport National Bank of Freeport, Texas, and the other one was a countercheck. The best I can make out the name of it, it was the Brazosport Bank of Commerce of Freeport, Texas. Then there were two checks that I don't have in my file any more that were given to Charles Adams Harness Shop on Eighth Avenue here. Then we have an unserved warrant from Sevier County, given to a motel in Gatlinburg. I don't have that check, so I don't know what bank it was written on.

Q. General Shriver, whose function is it to decide to present a criminal case before the grand jury?

A. The District Attorney has really pretty much sole discretion about that.

Q. There is not anything that prosecuting witnesses would have to do?

A. No.

Q. Did you at the time the matter was presented to the grand jury, do you recall whether you knew anything about a claim of a promissory note having been given to First American?

A. I'm not absolutely certain about that. The information about the note—I have a notation in my file here where John Tune, who represented the defendant at that time, came to see me and brought that to my attention. My problem about that is, I didn't date my note to the file about that. But attached, or at least adjacent to that

in the file, is a note that Mr. Tune wrote a letter —that Mr. Tune wrote to Mr. John Russell, First American Bank, which is dated June 26, 1967. This case was—these four cases were indicted on June 23, 1967. So, I am assuming I knew about the note at least within a week of the indictment, if not before. I don't know whether I knew about it before the indictment or not. I can establish by this letter and note that I knew within a week of this indictment anyhow.

Q. Let me ask you, if you had known about the claim of a note having been given to First American Bank, would that make any difference in your presenting this matter to the grand jury?

A. No. For two reasons. The first and most significant reason is that restitution, that is paying the money back, in a criminal case, or an offer to pay the money back in a criminal case, is not a defense. In other words, if a person commits a crime, the fact he wants to pay back what he took doesn't change the state's interest in prosecuting. The parties to the transaction may have an interest in doing that. In this case Mr. Phinney might be interested in paying the money back. The bank might be interested in taking the money. But the state has an interest over and above that, the interest being that the state wants to see that the people who write bad checks don't remain free and unprosecuted. (TR. 637-40).

THE EFFECT OF THE CONVICTION OF PLAINTIFF ON PROBABLE CAUSE

Having resolved the issues of the alleged perjury and forgery on the basis of insubstantial evidence, it is unnecessary to reach the issue of the effect of the prior conviction in Criminal Court. However, since it has been raised by both parties and extensively briefed, the Court

will address this issue so that all issues will be available for review by the appellate courts.

The conviction of plaintiff in the Criminal Court of Davidson County, though later reversed because the statute was repealed, conclusively establishes the existence of probable cause, unless the conviction was obtained by fraud, perjury, or other corrupt means. Restatement (Second) of Torts § 667 (1977). Plaintiff cites *Memphis Gayoso Gas Co. v. Williamson,* 56 Tenn. (9 Heisk) 314 (1872), as authority for the proposition that such prior conviction is only *prima facie* evidence of probable cause rather than conclusive. Admittedly, the Tennessee Supreme Court in that opinion used the words "prima facie" in one part of the opinion. In another, however, the Court used the words "presumptive of probable cause." *Id.* at 324. The thrust of the opinion, although not carefully worded, is in line with the Restatement language. This is the holding of a great majority of the courts of this country (see the annotation in 86 ALR 2d 1090, in which the annotator places Tennessee in the majority on the basis of the *Memphis Gayoso* case), and is the better rule. It is founded upon important public policy considerations that judgments and decrees should not be collaterally attacked and that persons participating in the administration of criminal justice should not be lightly subjected to future harassment. *See Crescent City Live-Stock, Landing & Slaughter-House Co. v. Butchers Union,* 120 U.S. 141, 159, 7 S.Ct. 472, 481, 30 L.Ed. 614, 621 (1877).

For the alleged perjury or forgery to be allowed to overcome this effect of the prior convictions, it must be extrinsic or collateral. *Tarantino v. Griebel,* 9 Wis.2d 37, 100 N.W.2d 350 (1960); *Topolewski v. Plankinton Pack-*

ing Co., 143 Wis. 52, 126 N.W. 554 (1910); 88 ALR 1201, 1207 (1934).

The plaintiff and the officers of defendant, Jones and Weisiger, testified to essentially the same facts in the criminal case as they did in this litigation. The jury of twelve judged the credibility of these witnesses and applied the much more stringent standard of "beyond a reasonable doubt." The only new testimony in this trial was that of the forgery. The validity, authenticity and purpose of the note (Exhibit 17) were either at issue or subject to being tried at the criminal proceeding. Such alleged fraud or perjury was intrinsic to the issues of that trial and may not now be raised in a collateral attack before another jury applying a standard of only a bare preponderance.

For all of the foregoing reasons, the defendant's motion for judgment notwithstanding the verdict is granted, and judgment will be entered thereon in favor of the defendant.

RULE 50(c) ALTERNATIVE MOTION FOR A NEW TRIAL

Defendant also moves for a new trial, alternatively under Rule 50(c), F.R.C.P. In the event that the judgment of the Court on the motion n.o.v. is reversed on appeal, the Court conditionally grants the motion for a new trial upon the ground that the verdict of the jury is contrary to the weight of the evidence.

Unlike the motion n.o.v., a motion for a new trial based on the weight of the evidence "is addressed to the sound discretion of the trial court, which may set aside the verdict as contrary to the preponderance of the evi-

dence, although a directed verdict or judgment n.o.v. is not justified. 6A Moore's Federal Practice 59-156.

> On such a motion it is the duty of the judge to set aside the verdict and grant a new trial, if he is of opinion that the verdict is against the clear weight of the evidence, or is based upon evidence which is false, or will result in a miscarriage of justice, even though there may be substantial evidence which would prevent the direction of a verdict. 6A Moore's Federal Practice 59-158.

The review of the evidence hereinabove made on the motion n.o.v. need not be repeated here. In addition thereto, however, the Court observes:

1. Mr. Phinney was characterized as a "check kiter" by Mr. Owen Farrell (TR. 550). He ran up an overdraft balance at Commerce Union Bank of $27,000 by his own testimony (TR. 250).

2. His financial dealings were less than responsible for some period of time prior to the extradition on this check. General Shriver had seventeen warrants (TR. 638) for bad checks; he had a bad check to a harness shop (TR. 130); he had bad checks to Clyde Stone for horses (TR. 127); he wrote a number of checks on the First American account, one of $1,750, when he knew he had only $5 or less in the account.

3. The check on which he was prosecuted was not isolated incident. It is difficult to see how he could lay the blame for any damage to his career to this prosecution when there were numerous others which could just as easily have been the vehicle by which his bubble was burst.

After viewing this verdict in the overall setting of the trial, having observed the manner and demeanor of

the witnesses, and considering the character of the evidence and the complexity of the legal principles which the jury was bound to apply to the facts, it is quite clear to the Court that the jury reached a seriously erroneous result. The jury has either acted under some mistake, or they were motivated improperly by some feeling of bias or prejudice. It is the Court's duty to set this verdict aside in order to avert a serious miscarriage of justice.

/s/ Jonas L. Anderson
UNITED STATES DISTRICT JUDGE

79-1372

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DON RAY PHINNEY

Plaintiff-Appellant

vs.

FIRST AMERICAN NATIONAL BANK

Defendant-Appellee

O R D E R

(Filed March 18, 1981)

Before: EDWARDS, Chief Judge, BROWN, Circuit Judge and BATTISTI,* District Judge.

---

*Honorable Frank J. Battisti, Chief Judge, United States District Court for the Northern District of Ohio, sitting by designation.

This is a strange case. A young man named Don Ray Phinney, afflicted with a serious stutter (but capable of singing without it) and apparently possessed of some talent as a vocalist, went to Nashville, Tennessee to launch a singing career. Unfortunately for his career, he was unable or unwilling to desist from the practice of cashing checks as to which there was no balance in the bank. A total of 17 such checks from a variety of banks, seven of them from defendant First American National Bank of Nashville, were turned over to the prosecuting attorney for appropriate action. This ultimately resulted in Phinney's being convicted in a criminal trial for violations of the Tennessee Bad Check Law.

On appeal, his conviction was reversed because the statute under which he had been indicted had been repealed. Several years later, plaintiff filed the instant action (charging malicious prosecution and outrageous conduct in violation of the laws of Tennessee) in the United States District Court for the Middle District of Tennessee. The case was tried to a jury which awarded plaintiff compensatory damages of $999,999.00 and punitive damages of $250,000.00.

Understandably, a motion for judgment n.o.v. was filed before Judge Thomas Wiseman who ultimately granted it in a well-reasoned opinion citing this court's standard: ". . . the evidence must be viewed in the light most favorable to the party against whom the motion is made, drawing from the evidence all reasonable inferences in his favor. If after thus viewing the evidence, the trial court is of the opinion that it points so strongly in favor of the movant that reasonable minds could not come to a

different conclusion, then the motion should be granted." *Morelock v. NCR Corp.*, 586 F.2d 1096 (6th Cir. 1978).

On consideration of the total record in this case and the oral arguments, the judgment of the District Court is affirmed for the reasons set forth in the careful and thorough memorandum opinion of Judge Thomas Wiseman dated July 6, 1979.

ENTERED BY ORDER OF THE COURT
/s/ John P. Hehman
Clerk